BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is not officially reported, but may be found at page 108 of the Record.

II

Jurisdiction

1. The date of the judgment to be reviewed is November 10, 1943 (R. 117).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended. 28 U.S.C.A. 347.

III

Statement of the Case

The statement set forth in the preceding Petition is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The Court erred in giving to the word "define", as used in 29 U.S.C.A. 208 (f), an interpretation which

allows an administrative officer functioning under delegated powers to formulate a vague definition for use in a wage order and then expand its scope by interpretation.

2. The lower court erred in holding that Wage Order No. 30 defined the industry in which petitioners are engaged.

V

Summary of Argument

Point A: The power conferred on the Administrator to initiate proceedings to raise the minimum wage rates must be exercised in strict conformity with the provisions of the Act.

Point B: The definition as contained in Wage Order No. 30 does not include the petitioners.

POINT A

Delegated Power

The Congress prescribed the general minimum wage rates. 29 U.S.C.A. 206. It provided for the appointment of the Administrator of the Wage and Hour Division of the Department of Labor (id. 204). The Administrator is authorized to initiate proceedings whereby the minimum wage rate for any particular industry or group of industries may be increased above the general minimum rate. He defines the industry or industries and appoints an Industry Committee. Its membership must include representatives of employers and employees within the industry or industries and representatives of the public. The Administrator convenes the Industry Committee and re-

fers to it questions as to whether the existing wage rate should be increased with respect to that particular industry or industries (id. 208). The Administrator is directed to supply the Committee with pertinent data and to bring before it witnesses so as to familiarize the Committee with the conditions within the industry or industries (id. 205). The Committee files a report containing its recommendations "after due notice to interested parties and giving them an opportunity to be heard". The Administrator may carry the recommended wage rate into effect (id. 208 (d)).

It is left to the Administrator to formulate a definition of the industry or industries and to initiate proceedings, but the Congress, in safeguarding the interests of those to be affected, inserted the following provisions:

> "(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.
>
> "(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administor deems reasonably calculated to give general notice to interested persons" (29 U.S.C.A. 208 f and g).

In the case of *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, this Court sustained this delegation of powers to the Administrator, but it was pointed out that such delegation of powers was valid because the Congress had defined the circumstances under which the Administrator and the Committee could function. From the opinion:

> "* * * The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance in the constitutional sense, of the legislative function" (p. 144).

One of the circumstances defined by the Congress was that the Administrator himself should "define the industries * * * to which they are to apply" (29 U.S.C.A. 208 f).

An agency exercising delegated powers "must pursue the procedure and rules enjoined, showing a substantial compliance therewith to give validity to its action". See *Wichita R. R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48.

Before any industry can be bound by a wage order, it must be shown that the Administrator pursued the procedure and rules enjoined and complied substantially with the provisions of the Act which required him to "define" the industries to be affected. The idea that the definition to be used in a wage order must be precise and not one which can be expanded by interpretation finds support in the *Opp* case. There it was stated that the definition as formulated by the Administrator might be amended during the deliberations of the Committee, but that it was imperative that the recommendation of the Committee and the Order of the Administrator be based on "the same definition". If the Committee uses a definition which

would not suggest the inclusion of bow and arrow manufacturers as a part of the Lumber and Timber Products Industry, then the Administrator is to be denied the power to bring bow and arrow manufacturers in by interpretation. Otherwise there would be a variation in the definition as used by the Committee and as used by the Administrator in the enforcement of the Wage Order.

The Circuit Court of Appeals found a similarity between Wage Orders and Legislative Acts, saying that the former are "governed by the same rules of interpretation and construction" (R. 112). It seems to us that the analogy is misplaced. The Congress has commanded that the Administrator "define the industries to be included in a Wage Order." That is a condition precedent. To indulge in construction and interpretation in search for the Administrator's intention, as is done with respect to Legislative Acts, would nullify both the Congressional mandate and its purpose. It would produce "administrative action beyond or contrary to the legislative will". See dissenting opinion of Mr. Justice Reed in the case of *Switchmen's Union of North America* v. *National Mediation Board,* decided November 22, 1943.

POINT B

The Definition of the Lumber and Timber Products Industry Does Not Include Petitioners

In the trial court the Administrator contended that petitioners were within the definition because they manufactured "wood turnings and shapings" and "specialized timber products". In the United States Circuit Court of Appeals the first contention was abandoned and the Administrator rested his case entirely on the contention that

petitioners are manufacturers of "specialized timber products". Therefore only that portion of the definition is relevant. It reads as follows:

> The manufacture of specialized timber products, including, but without limitation: { Shingles; Cooperage stock; Veneer; Plywood and Veneer packaging

The five products mentioned are "timber products" and are so regarded by all within that industry. All of the five named products involve logging, sawmill operations, and the sale of the products as they come from the mills. No one is a by-product. In all, the logs are cut, transported and milled for the sole purpose of producing those particular products. That is shown by the witnesses who testified before the Industry Committee (R. 84-94). Approximately twenty witnesses appeared before the Committee, submitted data, and discussed the advisability of an increase in the minimum rate for members of the Lumber and Timber Products Industry. Not a word was spoken with reference to the problems of bow and arrow manufacturers or sporting goods manufacturers or concerning their special methods of operation, or the characteristics of their products. As might be anticipated, the discussions, with one exception, were limited to the problems and the methods of manufacturers who were clearly within the definition. The one exception was the witness Emil Kekich, a representative of the Match Industry, and he appeared at the suggestion of some representative of the Wage and Hour Division (R. 93).

No one would think of bows and arrows as coming within the category of "specialized timber products". To speak of a "timber product" is to suggest logging, sawing,

and mill production of material which is to be used for building purposes. See the definition of "timber" as contained in *Webster's New International Dictionary, Second Edition.* An entirely different concept is formed when reference is made to bows and arrows. One naturally would think of the manufacture of bows and arrows along with the manufacture of tennis rackets, golf sticks and the like as "sporting goods manufacturers". The latter do not operate mills or function primarily in the production of timber products for the use of others. Sporting goods manufacturers purchase the wood which they use from those who are within the Lumber and Timber Products Industry, and then a few of their employees shape these timber products thus purchased so that other employees may transform them, along with other materials, into articles which are distinctive and far removed from the concept of a timber product.

These manufacturers call themselves "sporting goods manufacturers", and they are so classified by insurers who provide workmen's compensation insurance for them. The rates which they pay are much less than the rates paid by typical members of the Lumber and Timber Products Industry (R. 49). That is due, of course, to the fact that such a small proportion of the employees are engaged in the operation of woodworking machines. 86 per cent of the petitioners' employees do nothing but ornament, add materials, and do the precision work which makes the articles function accurately in the practice of archery.

In *Webster's New International Dictionary, 2d Edition*, the word "define" is defined as follows:

> "To state explicitly after judging carefully; to fix, decide or prescribe clearly and with authority;

"To mark the limits of; to determine with precision; to state clearly the boundaries of;

"To set apart in a class by identifying marks; to characterize; to distinguish."

Judge Johnsen, in writing the opinion for the lower court, said:

"Here, as in the general testing of any legislative remedial act, it is reasonable and practicable certainty and not legalistic preciseness that is the sound criterion in definition" (R. 113).

That deviates somewhat from the dictionary meaning, but that is immaterial for the definition in question does not meet the test of "reasonable and practicable certainty". The only words of the definition which are said to include petitioners are the following:

"The manufacture of specialized timber products."

Never before had the petitioners been called manufacturers of "timber" products. How would they know they were supposed to be included if it was the first time they were ever classed along with shingle mills, etc., as manufacturers of specialized "timber" products? There is no similarity whatever in their methods of operation or in the character of their products. There can be no "practicable certainty" in any definition which for the first time calls a sporting goods manufacturer a manufacturer of "timber" products. Judge Johnsen also said:

"* * * this does not mean that Congress intended to compel the Administrator to enumerate in his definition every specific product which the order was designed to cover. Such an attempted enumeration, as the Administrator points out in his brief, would cer-

tainly be a most difficult if not an impossible task" (R. 112).

Of course, the Administrator would not be expected to enumerate specific products. That would call for a definition having the expanse of a Sears-Roebuck catalogue. It would take thirty-seven listings just to include the products of petitioners. It is regrettable that the Circuit Court of Appeals was impressed by such an argument. It is demonstrably fallacious. The Administrator says now that bow and arrow manufacturers are included because wood is a component part of their products. It would have been easy for him to have conveyed that idea in the definition if at the time it was formulated he intended to include those whose products contained wood as a component part. It would only have been necessary for him to have included the following phrase:

"The manufacture of any product which contains wood."

That would have put all whose products contain wood on notice. That would have informed petitioners and others that the proceedings involved them. The administrator had no difficulty in formulating definitions for other Wage Orders which clearly and succinctly expressed the component part idea. In formulating a definition for the Converted Paper Products Industry, he used this language:

> "The manufacture of all products which have as a basic component pulp paper or board," etc. (Published Federal Register, September 22, 1942.)

His definition for the Leather Industry contained this:

> "The manufacture of welding and power transmission belting when made wholly or principally of leather." (Published Federal Register, May 15, 1940.)

And for the Rubber Industry the definition included the following:

> "The manufacture of all products which have as an ingredient any form of natural rubber, including latex, reclaimed rubber," etc. (Published Federal Register, April 5, 1941.)

Distinctions as to predominant use could also be plainly stated as was done in the definition of the Jewelry Industry. Parts for the listed articles of jewelry were included, but with this proviso:

> "The term, parts, as used in the foregoing paragraph does not include parts which are used predominantly for products other than jewelry such as springs, blades and nail files," etc. (Published Federal Register, May 30, 1941.)

It is evident that he had no idea of including all whose products contained wood. If he had such an idea, so easily to be expressed, then he would have expressed it. There are still other factors which demonstrate that he had no such idea; that he has brought the petitioners in by interpretation; and that he is straining the phrase "manufacture of specialized timber products".

After preparing the definition which was supposed to define the industries affected, but without any intention of altering it, he submitted to the Committee a document entitled "Minimum Wages in the Lumber and Timber Products Industry, Prepared by Research and Statistics Branch of the United States Department of Labor, Wage

and Hour Division, in June, 1941" (R. 67 and 82). In this document he gave the Committee his interpretation of his own definition. Nowhere is there the faintest suggestion that he construed it as including manufacturers of bows and arrows, tennis rackets, golf sticks and the like.

He told the Committee that the definition covered "excelsior and matches, burial cases or wood shipping boxes of caskets, coffins and other morticians' goods" (R. 68-69). But in the next paragraph he stated that "caskets and coffins" were excluded "because of their peculiar and special nature" (R. 70-71). In other words, he told the Committee that the manufacturers of wooden boxes in which caskets are shipped were included, but that manufacturers of coffins were excluded. His reason for making a distinction is apparent. The shipping box is made of wood, a few nails, and two hinges. As to both value and volume it is predominantly of wood. A coffin is of more complicated structure. It consist of wood, velvet, satin, padding, glass, paint, metallic handles, etc. In volume the wood preponderates, but the added materials have taken away all identity as a "timber" product. Coffins, says the Administrator, do not classify as timber products "because of their peculiar and special nature". It is clear that he has gone into the field of interpretation and is considering extrinsic factors. If he interprets his definition as not including a coffin because of its peculiar and special nature, then how can he include bows and arrows? The process of their manufacture and the variety and cost of the other materials which are added make them just as peculiar and special as are coffins. Logically he cannot interpret his definition as excluding coffins without also excluding bows and arrows.

In his communications he also told the Committee that a manufacturer of venetian blinds was not included (B. 71). The slats, however, which are used in the manufacture of venetian blinds are included (R. 84). The slats are timber products. They are mill-manufactured, like arrow shafts and the wood used for bows. The manufacturing of the slats is a part of the lumber and timber products industry. To make a venetian blind the manufacturer purchases slats from a slat manufacturer just as a bow manufacturer purchases the wood which is to be used in making a bow. The slats are trimmed to size just as the bow wood is trimmed. Holes are bored in both ends for threading the cord just as the ends of the bow are grooved for the bow strings. Tape is applied to hold the slats in place just as tape is applied to hold the handle riser on the bow in place. Metal fittings are attached which, with the cord, control the operation of the blinds just as the bow string is added which transmits the momentum to the arrow. The manufacturer who trims the slats, combines them with cord, tape and metal fittings is not included because venetian blinds are "unrelated in their manufacturing process to the products covered." Logically the Administrator cannot draw any distinction between a manufacturer of venetian blinds and a manufacturer of bows and arrows. Wood is used in the products of both, but neither naturally falls within the category of "timber products."

Had the Administrator used a definition containing the component part idea, then obviously it would have included both coffins and venetian blinds. He did not desire to include them, and that accounts for the fact that he failed to use definitions embracing the component part idea as he had done in other Wage Orders.

The Administrator also told the members of the Committee that the definition included:

Blackboards and blackboard erasers,
Wood novelties and specialties,
Dry and polishing mops,
Bobbins and spools,
Dowell pins,
Mop sticks,
Shoe lasts,
Woodenware bowls,
Woodenware dishes,
Pastry boards,
Clothes pins,
Ironing boards,
Clothes racks,
Wash boards,
Wooden beads.

Then he followed with the comment that the definition did not include "cigar boxes, specialties made of paper, metal, *wood and combination of materials*" (Emphasis supplied) (R. 71). If the inclusion of bobbins, spools, mops, etc., which were predominantly of wood, both as to value and volume, would convey to the average mind the inference that bows and arrows were also included, then certainly they would be puzzled by the further comment that the definition did not include specialties made of wood and a combination of materials, as it cannot be denied that bows and arrows are combinations of wood and other materials.

CONCLUSION

These interpretations given by the Administrator to the Committee during its deliberations would seem to be improper unless the official definition were at the same time amended. Otherwise there would come from the Committee the recommendation of a Wage Order for the industries defined in the official definition as interpreted by the Administrator, and then only the uninterpreted official definition would be published in the Federal Register. An interested party would have to study the official definition and then pursue the inquiry further and read the communications passing from the Administrator to the Committee in order to determine whether his particular industry would be affected. However, the interpretations which he gave to the definition in this instance do not harm petitioners. On the contrary, they would logically indicate that petitioners are excluded.

If the Administrator feels that manufacturers of bows and arrows should be included, then he may easily amend the definition and reconvene the Committee. The Committee, if it sees fit, may make the wage rate applicable to the petitioners and other bow and arrow manufacturers, but the petitioners will have had an opportunity to present their proof and arguments as to why they should not be included, or why they should be classified from within which is permissible under the Act.

This procedure may prove slightly inconvenient to the Administrator, but his inconvenience can scarcely be

weighed against the right of a citizen to have fair notice of any proceeding which may jeopardize the future of the business from which he earns his livelihood.

Respectfully submitted,

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